



FAQ FOR BUSINESS LEADERS AND PRACTITIONERS

Understanding recent business and human rights developments at the United Nations

INTRODUCTION

This FAQ sheet is intended to answer some basic questions for the business community regarding two resolutions adopted by the UN Human Rights Council (HRC) on 26 and 27 June 2014, one of which set in motion an intergovernmental process that could lead to a treaty on transnational corporations and human rights. Among other things, it addresses the process, procedures and potential scope of international treaty development in the business and human rights context.

By way of background, on 26 June 2014, the HRC adopted a [resolution](#) sponsored by Ecuador and South Africa to establish an intergovernmental working group (IGWG) to elaborate a treaty on transnational corporations and human rights (the treaty-focused resolution). The adoption of this resolution follows ongoing debate as to the measures that should be taken to address business and human rights-related challenges. In particular, this resolution has emerged from debate on the capacity of the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) to prevent business-related human rights impacts, and concerns relating to persisting barriers to effective redress.

On 27 June 2014, the HRC adopted a [second resolution](#) focused on business and human rights. Drafted by a long-standing cross regional group comprising Argentina, Ghana, Norway and the Russian Federation, this second resolution renews for a further three years the mandate of the UN Working Group on Business and Human Rights (UN Working Group), which was established in 2011 following the unanimous endorsement of the UNGPs by the HRC. This resolution also highlights areas of work to be pursued by the UN Working Group. Because most companies are not familiar with IGWGs or the dynamics of developing international treaties, this FAQ focuses mainly on resolution pertaining to the development of a treaty, which was drafted by Ecuador.

Please note that, although this FAQ sheet addresses legal issues, it does not provide legal advice. To obtain legal advice, we recommend that you contact a qualified legal practitioner.

[The Global Business Initiative on Human Rights](#) (GBI) exists to advance human rights in a business context around the world. GBI is led by a core group of 18 major corporations headquartered in Asia, Europe, Latin America, the Middle East, North Africa and North America. GBI focuses on how companies implement corporate respect for human rights, in all industries and in all geographies. Members are committed to knowing and showing that they respect human rights and via honest and pragmatic peer learning, seek to enhance their own efforts, and the efforts of peers. GBI also seeks to support constructive business inputs into the international policy agenda. The views expressed in this article are those of the GBI secretariat and do not necessarily represent the views of, and should not be attributed to, GBI member companies.

LIST OF QUESTIONS AND SHORT RESPONSES

Please click on hyperlinked question to access more detailed answers

A. THE UN WORKING GROUP-FOCUSED RESOLUTION

1. [What do I need to know about the resolution that renews the mandate of the UNWG?](#) The resolution was adopted by consensus. It focuses on the global endorsement of the UNGPs and their further dissemination and implementation. The resolution does not significantly alter the status quo. However, it does call for increased attention to access to remedy (both judicial and non-judicial), and addresses the creation of National Action Plans by States to implement their duty to protect human rights.
2. [What is the OHCHR process on access to remedy, which was referred to in resolution focused on the UN Working Group?](#) It is a process to clarify key issues and identify good practices, with a view to achieving more effective domestic law (i.e. judicial) remedies to address gross human rights abuses involving business actors. It has been set up as a multi-stakeholder consultative process and the OHCHR are seeking to engage relevant experts in the work. The business community is strongly encouraged to engage.

B. THE TREATY-FOCUSED RESOLUTION

3. [What does the treaty-focused resolution do?](#) It establishes an intergovernmental working group with the task of drafting text for, and seeking adoption of, a treaty on business and human rights in the HRC.
4. [Does the treaty-focused resolution change the status of the UNGPs?](#) No. The UNGPs remain the only authoritative, internationally endorsed standard on business and human rights. Moving forward, a key subject of debate will be whether the scope and substance of any proposed treaty recognizes the UNGPs as the overarching framework. Many feel that the development of draft treaty text is unlikely to dilute or undermine the progress that has been made over the past decade. However, there is a real risk that division between proponents and opponents of a treaty process may polarize dialogue between business, civil society and States and undermine the significant shift towards constructive engagement that has been made during and since the Ruggie Mandate. This risk is most likely to materialize if the UNGPs are set up in opposition to a treaty. As noted by India in its statement to the HRC,¹ and also recognized by John Ruggie and other commentators,² the UNGPs and a treaty can be complementary.
5. [Is there consensus about the need for a business and human rights treaty?](#) No. There is no consensus amongst States on the need for a business and human rights treaty. The resolution to start the process was adopted by a margin of 20 votes in favor, 14 votes against, and 13 abstentions. Individual States will now decide whether to engage in the sessions of the IGWG.

¹ UN Live United Nations Web TV – Meetings & Events – A/HRC/26/L.1 Vote Item 3, 39th Meeting 26th Regular Session, Human Rights Council, from approximately 25:57, available at: <http://webtv.un.org/meetings-events/index.php/watch/ahrc26l.1-vote-item3-39th-meeting-26th-regular-session-human-rights-council/3645563020001>.

² See e.g. discussion in Prof. John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (Institute for Human Rights and Business, 8 July 2014), available at: <http://www.ihrb.org/commentary/board/past-as-prologue.html>.

6. [What will be the likely focus or scope of conversations on a business and human rights treaty?](#) The precise scope and content of the treaty to be elaborated by the IGWG is not prescribed by the June resolution. However, certain items are expected to be discussed at length. Most notably, the resolution focuses on transnational corporations (TNCs), which raises numerous complex legal and definitional questions. Various commentators have raised other ideas as to possible scope/focus, including simply re-affirming existing State obligations or focusing on gross human rights violations and/or obligations to exercise extraterritorial jurisdiction to regulate companies operating abroad.

C. CREATING TREATIES AND THE INTERGOVERNMENTAL WORKING GROUP

7. [What is an intergovernmental working group?](#) An intergovernmental working group (or IGWG) is open to all States and subject to the rules of the General Assembly. The IGWG provides a forum for negotiations and consultation. Additionally, there is an expectation that intergovernmental organizations and non-governmental organizations with ECOSOC consultative status will be invited to attend public meetings of the IGWG and make statements and other contributions to the debates. Experts can be invited on an ad hoc basis.
8. [What steps are involved in creating a treaty?](#) Broadly speaking, there are five phases:
1. the establishment of an IGWG (this commenced in June 2014);
 2. negotiations within the IGWG;
 3. adoption or request for further work by the HRC;
 4. adoption by the UN General Assembly and opening to signature by States; and
 5. ratification by States that choose to do so.

Phase 3 could involve the HRC sending back any draft presented to it for further rethinking or reworking. Regarding Phase 5, an international treaty adopted by the UN General Assembly must normally be ratified by a certain number of States in order to enter into force. The exact number of ratifications required for the treaty to enter into force is decided in the text of the draft treaty itself.

9. [How much time is this process likely to take?](#) The negotiation process is likely to be lengthy. At one stage, Ecuador estimated that it might continue for a decade or more. The negotiation of international instruments can be time-consuming. For example, the UN Declaration on the Rights of Indigenous Peoples, a non-legally binding document, was negotiated over a period of 26 years. Given the breadth and complexity of the issues that States may wish to address in a treaty on business and human rights, and the current lack of consensus amongst States as to the whether a treaty presents a constructive way to advance the business and human rights agenda, it is reasonable to expect that the negotiation process will be lengthy.
10. [Can business engage?](#) Yes. There are likely to be both formal and informal opportunities for business to engage with the IGWG process and ongoing discussions about a treaty. The International Chamber of Commerce and International Organisation of Employers have consultative status. It is expected that individual companies and other business groups will be asked to engage in consultations (in person or in

writing). Beyond that, numerous research papers have been written and expert meetings are already being organised by bar associations, academic institutions and NGOs to conceptualise elements of a treaty. Thus far, organisers are tending to invite companies or those that work closely with business.

D. THE FORCE AND ENFORCEMENT OF UN TREATIES

11. [When treaties are agreed at the UN, who is bound by them?](#) The only States bound by treaties are those that sign and ratify them. Although it is conceivable that a treaty could impose obligations directly on companies, this is unlikely.
12. [How would a business and human rights treaty be enforced?](#) A business and human rights treaty would raise challenging questions about enforcement. Although the establishment of an international mechanism is conceivable, any such mechanism is likely to be fraught with practical difficulties. Ultimately, enforcement will likely require State action.

E. FURTHER BACKGROUND

13. [What is the background to these recent developments in business and human rights at the UN?](#) Both the recent resolutions seek to build on the UNGPs, which were unanimously adopted by the HRC in June 2011. The UNGPs set out an international policy framework that identifies the obligations of States and the responsibilities of companies as regards business-related human rights impacts and how to address them. They have been widely endorsed by State, business and civil society actors. The endorsement of the UNGPs marked a departure from decades of conceptual confusion and failed efforts to address the human rights impacts associated with business activity. Since 2011, there has been increasing convergence around the standards of expected conduct set out in the UNGPs, and the recommendations they make to State and business actors.

EXPANDED ANSWERS

A. The UN Working Group-focused resolution

1. What do I need to know about the resolution that renews the mandate of the UNWG?

The UN Working Group-focused resolution is a routine resolution that provides the mandate of the UN Working Group and the basis for the Annual Forum on Business and Human Rights.³ As such, it does not significantly alter the status quo. It simply re-affirms the importance of and support for the UNGPs, and the need to continue focusing on their dissemination and implementation via engagement with all stakeholders. The resolution was adopted by consensus – that is, without a vote – by the HRC member States.⁴ It extends the UN Working Group's mandate for a further three years, affirms a program of work proposed by the UN Working Group, and highlights certain aspects of that program - such as the focus on National Action Plans, the importance of the UN Annual Forum and the need to increase focus on access to both judicial and non-judicial remedies (Pillar 3 of the UNGPs).

One aspect of the resolution that may be of interest to business is that it explicitly addresses the "communications" aspect of the UN Working Group's mandate. Through this procedure, the UN Working Group receives specific information concerning alleged abuse of human rights related to the activities of business enterprises. On the basis of such information, when deemed reliable and credible, the Working Group may intervene directly with the involved parties to the complaint. The process, in general, involves sending a letter to the concerned state(s) and company requesting information and comments on the allegation. In cases involving transnational companies, the Working Group may also send a letter to the home State of that company requesting information about measures taken to encourage the company to respect human rights throughout its operations. The main purpose of such letters ("communications") is to obtain clarification in response to allegations of human rights abuses and to promote measures to protect human rights. The initial phases the communications are confidential. However, letters sent by the Working Group and replies received from Governments and business enterprises under the communications procedure are eventually made public (within three to six months) in the joint communications reports of Special Procedures of the Human Rights Council. The UN Working Group expects that the number of communications it will send during its second term will exceed the 22 it send between 2011 and June 2014, during its first three-year term.

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³ The Working Group on the issue of human rights and transnational corporations and other business enterprises is a UN Special Procedure, mandated in 2011 with the task of facilitating the implementation of the UNGPs. Further information about the Working Group can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

⁴ The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 United Nations Member States elected by the UN General Assembly. It is responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. Further information about the Human Rights Council can be accessed at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>.

2. What is the OHCHR access to remedy work referred to in the resolution focused on the UNWG?

The OHCHR⁵ has commenced a process to clarify key legal and conceptual issues and identify good practice in key areas relevant to improving the effectiveness of domestic law (i.e. judicial) remedies to address gross human rights abuses by business. This could be an important process given the strong concerns of many actors regarding the lack of progress in the area of access to judicial remedies under the UNGPs thus far. It could be aligned with the proposals/ideas (including from Professor John Ruggie) that any legal developments focus on the worst cases or gross human rights violations rather than trying to cover all human rights impacts.

The framework for this project is a study commissioned by the OHCHR in May 2013 (<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>). This study identified barriers to accessing justice at the domestic level, as well as the impact of different approaches adopted in different States. It also set out recommended areas for further inquiry. Arguably, the most important thing that companies should pay attention to is the section that outlines the ways in which companies can become involved in gross human rights abuses. It identifies four categories: “(i) cases where businesses and their managers are accused as the main perpetrators, (ii) cases where businesses supply equipment or technology in the context of a commercial trading relationship that is then used abusively or repressively, (iii) cases where businesses have been accused of providing information, or logistical or financial assistance, to human rights abusers that has “caused”, “facilitated” or exacerbated the abuse and (iv) cases where companies have been accused of being “complicit” in human rights abuses by virtue of having made investments in projects, joint ventures or regimes with poor human rights records or with connections to known abusers”.⁶

The UNGPs – and in particular the Guiding Principle 23 – address this topic, recommending that companies treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. The [Interpretive Guide](#) published by the OHCHR provides further guidance on the situations the pose a risk of involvement in gross human rights abuses, and relevantly observes:

“There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.”⁷

⁵ The Office of the High Commissioner for Human Rights (OHCHR) is a part of the United Nations secretariat. It is led by High Commissioner, who is the principal human rights official of the United Nations and spearheads all of the United Nations' human rights efforts. Further information about the OHCHR can be accessed at <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>.

⁶ Companies may also wish to visit www.redflags.info for further information about this topic.

⁷ OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, (United Nations, 2012) HR/PUB/12/02, p.6, available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

The OHCHR then invited all interested stakeholders to make written submissions on the issues identified in the study as requiring further clarification. This consultation process concluded on 30 June 2014, and the OHCHR has published a summary of the study and consultation process. OHCHR's remedy process was recognized in resolution focused on the UN Working Group. The resolution included a request to the OHCHR to continue this work and report on the work to the HRC in 2016. A progress report was also requested for 2015. The recognition by the HRC of this process and the opportunity to feed outcomes back to the HRC are important as they provide an opportunity for direct impact both at the national level and on deliberations in an intergovernmental context, including possibly through the IGWG process.

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B. The treaty-focused resolution

3. What does the treaty-focused resolution do?

The resolution sets in motion a process to develop a treaty on business and human rights, through the establishment of an Intergovernmental Working Group (IGWG). The resolution was sponsored by Ecuador and South Africa with the support of certain other states, including Bolivia, Cuba and Venezuela. The resolution tasks the IGWG with elaborating a text for a legally binding instrument on "transnational corporation and other business enterprises with respect to human rights". A treaty proposal would have to be approved by the General Assembly before it can be opened for signature and ratification by states. There is no guarantee that a binding treaty will come into existence, as States can abandon the IGWG process at any time, either because they conclude that a TNC and human rights treaty is unlikely to be effective or because there is a lack of sufficient political support and agreement amongst States.

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4. Does the treaty-focused resolution change the status of the UNGPs?

No. The UNGPs remain the only authoritative, internationally endorsed standards on business and human rights. The resolutions adopted by the HRC in June 2014 did not change their status. In fact the debate and commentary around the resolution related to a treaty, and the consensus on the UN Working Group-focused resolution, re-affirmed the importance of the UNGPs and their strong State support both from those having voted in favour of and against the commencement of a treaty negotiation process.

Moving forward, a key subject of debate will be whether the scope and substance of any proposed treaty should recognise the UNGPs as the overarching framework. Many feel that the development of draft treaty text is unlikely to dilute or undermine the progress that has been made over the past decade. However, there is a real risk that division between proponents and opponents of a treaty process will polarize dialogue between and among the business and civil society communities and States, and undermine the significant shift towards constructive engagement that has been made during and since the Ruggie Mandate. This risk is most likely to materialize if the UNGPs are set up in opposition to a treaty. As noted by India in its statement

to the HRC,⁸ and also recognized by John Ruggie and other commentators,⁹ these options can be complementary.

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5. Is there consensus about the need for a business and human rights treaty?

No. Currently, there is no consensus amongst States on the need for a business and human rights treaty. The resolution sponsored by Ecuador and South Africa was not universally supported by HRC member States, but was instead adopted by a majority vote. Twenty States voted for the resolution, 14 voted against and 13 States abstained. Prior to voting on the resolution tabled by Ecuador and South Africa, several States (for example, India), made statements to the HRC recognizing the value of the UNGPs and committing to continue to work to implement them. It is important to underline that no State expressed opposition to the UNGPs or their place as the authoritative framework for the business and human rights discussion.

Broadly, three distinct groups of States can be discerned:

- Group One: States that believe the UNGPs are too weak and would prefer a legally binding international treaty.
- Group Two: States that view the UNGPs and the development of a treaty as complementary.
- Group Three: States that believe the UNGPs are sufficient, and see no need for further international legal developments.

Several States, including the US, the UK and Italy (on behalf of the EU) made statements to the HRC expressing concern that an international treaty on business and human rights was unlikely to achieve the aspirations set for it, and that its development would not be the best use of time or resources.¹⁰ Further, an essential dynamic of this process was underlined by China (which voted in favor of the treaty-focused resolution) in a statement it made to the HRC that suggested it is not fully committed to agreeing a treaty, but rather is interested in exploring opportunities to achieve consensus amongst states to progress solutions to business and human rights-related challenges. Many developing States are in this position. The table below identifies the voting decision of each HRC member State. We note that States are not required to submit their rationale for voting.

⁸ UN Live United Nations Web TV – Meetings & Events – A/HRC/26/L.1 Vote Item 3, 39th Meeting 26th Regular Session, Human Rights Council, from approximately 25:57, available at: <http://webtv.un.org/meetings-events/index.php/watch/ahrc26l.1-vote-item3-39th-meeting-26th-regular-session-human-rights-council/3645563020001>.

⁹ See e.g. discussion in Prof. John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (Institute for Human Rights and Business, 8 July 2014), available at: <http://www.ihrb.org/commentary/board/past-as-prologue.html>.

¹⁰ UN Live United Nations Web TV – Meetings & Events – A/HRC/26/L.22 Vote Item 3, 37th Meeting 26th Regular Session, Human Rights Council, available at: <http://webtv.un.org/meetings-events/index.php/watch/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474570001>.

20 IN FAVOR	14 AGAINST	13 ABSTENTIONS
Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam	Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the Former Yugoslavia, United Kingdom, United States	Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates

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6. What will be the focus or scope of conversations on a business and human rights treaty?

The precise scope and content of the treaty to be elaborated by the IGWG is not prescribed by the treaty-focused resolution. However, the resolution does restrict the scope of the treaty text to be drafted by the IGWG to transnational corporations (TNCs). TNCs are defined as "business enterprises that have a transnational character in their operational activities". One implication of this definition is that the draft treaty text to be developed by the IGWG is unlikely to apply to local companies, and may not apply to subsidiaries of TNCs. Given the difficulties of identifying precisely which business enterprises' activities have a "transnational character", it will be difficult to identify which businesses' activities may be captured by a business and human rights treaty. Accordingly, the resolution's focus on TNCs is likely to generate significant discussion in the early phases of the IGWG's work. In addition to the legal/practical challenges regarding the identification of enterprises to which the definition of "TNC" would apply, the focus on TNCs may also give rise to political challenges, particularly when States that favour negotiating a treaty confront the likelihood that their own companies will also be subjected to that treaty. This focus on TNCs may be the first thing to be set aside once discussions start, or it is likely to occupy a vast amount of the IGWG's and other stakeholders' time and attention.

It is open to the IGWG to consider options that address overarching business and human rights-related challenges, or to instead focus on a particular issue or challenge. The IGWG's determination of the focus and scope of the draft treaty text is likely to be informed by stakeholder input. The treaty-focused resolution provides that the first two meetings of the IGWG are to serve to collect inputs from States and relevant stakeholders, which would include the business community. On the potential substantive elements of a treaty, it is worth noting:

- The State duty to protect against human rights abuses by third parties, including business enterprises, exists already in international human rights law, and is increasingly being referenced by

UN treaty monitoring bodies. Accordingly, an instrument that seeks merely to confirm this duty would add little to existing international human rights law obligations.

- International human rights law permits, but does not generally require, States to exercise extraterritorial jurisdiction to protect human rights beyond territorial boundaries.¹¹ The elaboration of a duty to exercise extraterritorial jurisdiction has been identified as one way in which an international business and human rights treaty may add substantively to existing international law. This is likely to be very contentious. States exercise extraterritorial jurisdiction in a number of areas, including to prohibit bribery and other corrupt practices, and to regulate intellectual property. Despite this, many States have indicated that they consider the use of such jurisdiction to generally be inappropriate as regards human rights, although there are instances – such as in relation to the worst forms of child abuse – where extraterritorial jurisdiction has been used to protect human rights.¹²
- It has also been suggested that an international treaty may focus on a particular issue area, such as business involvement in gross human rights abuses, and seek to strengthen legal protection against such abuses.¹³ This would likely include a discussion of the extraterritorial dimensions of the issue and/or solutions.
- A treaty directly regulating the activities of companies would be groundbreaking for international human rights law. This is also likely to be highly contentious, not only among many States, but also among other stakeholders such as international legal experts.

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C. The process of creating treaties and the intergovernmental working group (IGWG)

7. What is an intergovernmental working group?

An intergovernmental working group (or IGWG) is open to all States and subject to the rules of the General Assembly. The IGWG provides a forum for negotiations and consultation. Additionally, there is an expectation that intergovernmental organizations and non-governmental organizations with ECOSOC consultative status will be invited to attend public meetings of the IGWG and make statements and other contributions to the debates. Experts can be invited on an ad hoc basis. However, only States negotiate the text.

¹¹ See for example the discussion in UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008), UN Doc A/HRC/8/5, ('Protect, Respect and Remedy Framework'), [19], available at: <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

¹² Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' *Working Paper No. 59 of the Corporate Social Responsibility Initiative* (June 2010), available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf. See also discussion in John Ruggie, 'International Legalisation in Business and Human Rights' (Harvard Kennedy School, 11 June 2014), 5, available at: http://business-humanrights.org/sites/default/files/media/documents/ruggie_-_wfls.pdf.

¹³ See for example the discussion in Prof. John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (Institute for Human Rights and Business, 8 July 2014), available at: <http://www.ihrb.org/commentary/board/past-as-prologue.html>.

Participation is voluntary and does not imply accepting the outcome of the discussions. Any given State could decline to participate initially, then join the working group late in the process (or vice-versa). States pursue different strategies through their decisions to participate or not participate in IGWGs. These strategies may impact negotiations in various ways. Recent experiences have shown that boycotting the sessions does not necessarily have a significant impact on the final draft treaty texts produced by IGWGs.

The establishment of an IGWG is a common way in which texts of international treaties are developed. For example, there are currently IGWGs on the development of an Optional Protocol to the Convention on the Rights of the Child, a draft UN declaration on human rights education and training, a draft UN declaration on the right to peace and an IGWG with the mandate to explore the possibility of developing an international regulatory framework (including a binding legal instrument, among other mechanisms) to regulate the conduct of private security and military companies.

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8. What steps are involved in creating a treaty?

The IGWG will commence work to prepare draft text for a treaty on business and human rights in 2015. The way in which the IGWG will operate will depend on both its mandate and procedural decisions made by IGWG members during initial meetings. However, broadly speaking, the process of drafting and negotiating an international treaty has five phases:

PHASE 1	Political agreement to commence negotiations and establish an IGWG. This phase was completed in June 2014, with the adoption of the resolution sponsored by Ecuador and South Africa.
PHASE 2	Negotiations within the IGWG, during which member States will develop a draft text and receive input from stakeholders.
PHASE 3	The draft text will be presented to the HRC. There are three possible outcomes of this phase: <ul style="list-style-type: none">• The draft text will be accepted by the HRC and transmitted to the UN General Assembly for adoption; or• The draft text will not be accepted by the HRC, and will be sent back to the IGWG for further work and amendment. At this stage, we consider that this is the most likely option; or• The draft text will be discarded, and a new process commenced. Alternatively, the process will be abandoned.
PHASE 4	If the text is transmitted to the UN General Assembly, there are again three possible outcomes: <ul style="list-style-type: none">• The text will be adopted by the UN General Assembly and opened to signature by States; or• The text will not be adopted by the UN General Assembly, and will be sent back to the HRC for further work and amendment. Although this outcome is possible, in practice it would be highly unusual; or• The text will not be adopted, and the process will be abandoned.
PHASE 5	An international treaty adopted by the UN General Assembly must normally be ratified by a certain number of States in order to enter into force. By signing a treaty, States indicate their support for its terms. However, they are not legally bound until they ratify the treaty. It is not uncommon for several years to lapse between a treaty's adoption by the UN General Assembly and the date on which it comes into effect. For example, the International Covenant on Civil and Political Rights was adopted on 16 December 1966, but did not enter into force until 23 March 1976. The number of States required to ratify a treaty in order for it to come into force will usually be set out in the treaty text.

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9. How much time is this process likely to take?

The IGWG is likely to be established and to commence its work promptly. The IGWG will meet for five working days a year, starting in July 2015, though consultations may commence prior to the first session.

However, the negotiation of international instruments can be lengthy. For example, the UN Declaration on the Rights of Indigenous Peoples was negotiated over a period of 26 years. Given the breadth and complexity of the issues that States may wish to address in a treaty on business and human rights, and the current lack of consensus amongst States as to the whether a treaty presents a constructive way to advance the business and human rights agenda, it is reasonable to expect that the negotiation process will be time-consuming. In informal consultations prior to the vote, Ecuador estimated that negotiations may require a decade or more.¹⁴ Importantly, and as noted above, there is no certainty that agreement amongst States will be reached or that a treaty will be adopted and come into force.

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10. Can businesses engage with the IGWG?

Yes. Regarding business engagement, this can be understood at both a formal / procedural level and more informally. On the former, the International Organisation of Employers and International Chamber of Commerce have ECOSOC consultative status, meaning they can participate in IGWG sessions. Both organisations are already actively engaged in the business and human rights agenda and represent good avenues for the business community to input. On the latter, the IGWG may select to convene open or invite-only expert consultations to which businesses may be invited. Regardless, it is very clear that the public dialogue / discussion / debate that has started will continue. We can expect numerous research papers, articles and events that will be noticed by (and could feed into) the deliberations of the IGWG. Furthermore, individual States are more than likely to reach out to business leaders domiciled, or operating, in their country for inputs.

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¹⁴ Prof. John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (Institute for Human Rights and Business, 8 July 2014), available at: <http://www.ihrb.org/commentary/board/past-as-prologue.html>.

D. The force and enforcement of UN treaties

11. When treaties are agreed at the UN, who is bound by them?

Legal duties under an international treaty will only bind those States that consent to be bound by them. Accordingly, any State that chooses not to ratify¹⁵ the treaty will not be bound by its terms. As discussed above, a number of States – including, significantly, the US, the UK and EU Member States – currently oppose the development of a business and human rights treaty.

The possibility of establishing legally binding obligations for business actors directly under international law has been raised. States are the primary subjects of, and duty bearers under, international law. However, in certain circumstances, public international law does recognize the international legal capacity non-State actors, such as individuals and corporate entities. For example, individual corporate officers have responsibility for international crimes such as piracy and slavery, and corporate entities have rights under certain international agreements, such as bilateral investment treaties. Accordingly, although many significant and complex challenges to extending human rights law duties to companies exist, the possibility cannot be excluded.¹⁶

If obligations are imposed directly on companies, States will still be required to take action under domestic law to enforce those obligations. This is discussed further at 12, below. However, either way, the situation will engage the traditional dilemma regarding the capacity and/or willingness of States to enforce their own laws and obligations, which is already at the centre of the business and human rights debate.

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12. How would a business and human rights treaty be enforced?

The prospect of an international business and human rights treaty raises challenging questions about the enforcement of States' duties and obligations under the treaty, and also of any direct expectations established for corporations (should this come to pass).

The enforcement of international treaties as between States presents a number of practical challenges. By contrast with the domestic sphere, there is no international court that has power to compel States' compliance with international legal obligations, although mechanisms such as the International Court of Justice have some power to authoritatively interpret international law and to adjudicate disputes. Instead,

¹⁵ Signature of a treaty indicates a State's willingness to continue the treaty-making process, but does not result in a State being legally bound by the treaty itself. A State will generally only be bound by the terms of a treaty once it has ratified it. For more, see: https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#ratification.

¹⁶ See for further discussion, Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum – Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops' (15 February 2007), available at http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/4/35/Add.2.

the international legal system relies heavily on the commitment and ability of States that are parties to a treaty to take steps – including through diplomatic measures – to promote compliance with the terms of treaties. States' use of such measures to enforce compliance with international human rights standards varies widely; in certain circumstances, international condemnation may result in trade sanctions or even the use of armed force; in others, violations may be merely criticized or even overlooked entirely. Non-state actors, such as civil society organisations, can also contribute to States' accountability under international human rights treaties by engaging with treaty monitoring bodies and through other forms of advocacy.

The enforcement of any direct expectations of companies will depend significantly on the text of the treaty (if agreed), the nature of the duties and expectations it establishes, the States that ratify the treaty and the steps those States take to meet their own obligations under it. The establishment of an international mechanism, such as a court or tribunal, that is empowered to adjudicate human rights claims against companies directly or resolve them through arbitration, has been proposed. This proposal raises significant doctrinal and practical challenges. Therefore, such a mechanism is not likely in the short-term. Alternatively, a treaty monitoring body could be established to monitor State and corporate compliance with a business and human rights treaty. However, this option also presents challenges, including in particular as regards its effectiveness. As noted by Ruggie, with more than 80,000 multinational corporations, the challenges for such a body to manage its caseload would be daunting.¹⁷ A treaty could also rely on the use of domestic courts to enforce expectations of companies. As discussed at 6, above, one could imagine treaty obligations with extraterritorial implications, for example, requiring States to exercise extraterritorial jurisdiction to promote corporate accountability or access to remedy for human rights abuses (that is, by regulating the conduct of corporations operating abroad, as well as within their territory). While that possibility exists, it is worth emphasizing that the probability is extremely low because it is unlikely to attract support from the vast majority of States. That said, extraterritorial jurisdiction is widely used in other areas of law and presents opportunities for States to regulate the transnational aspects of corporate activity.¹⁸

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E. Further background

13. What is the background to these recent developments in business and human rights at the UN?

The adoption by the HRC of both resolutions in June 2014 are the most recent developments in the area of business and human rights, which has been on the international agenda in various forms since at least the 1970s. Importantly, both of these resolutions seek to build on the UNGPs, which were unanimously adopted by the HRC in June 2011, and the progress that has been made since then to implement them.

The history of business and human rights-related developments at the international level has been widely written about, including in a recent blog by former Special Representative on Business and Human Rights,

¹⁷ John Ruggie, 'A UN Business and Human Rights Treaty Update' (Harvard Kennedy School, 1 May 2014), p.2, available at http://business-humanrights.org/sites/default/files/media/un_business_and_human_rights_treaty_update.pdf.

¹⁸ For further, see eg John Ruggie, 'A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie' (Harvard Kennedy School, 28 January 2014), p.4, available at <http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

Professor John Ruggie.¹⁹ However, in brief, the adoption of the UNGPs constituted a watershed moment in business and human rights, marking a departure from decades of conceptual confusion and failed attempts to address human rights impacts associated with business activity. Earlier efforts included unsuccessful attempts to reach consensus on codes of conduct for transnational corporations in the 1970s and 80s, and also the development of draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms), which were presented to the then UN Human Rights Commission in 2003. The Norms purported – controversially – to impose direct international human rights law obligations on companies, and were strongly opposed by transnational corporations and business associations.

The Norms were abandoned in 2005, and Professor John Ruggie was appointed as Special Representative of the Secretary-General in 2005 with a mandate to – amongst other things – identify and clarify standards of corporate responsibility with regard to human rights. During his mandate, which was extended to June 2011, Ruggie developed a framework that rested on three pillars: i) the State duty to protect against human rights abuses, including by third parties such as business enterprises; ii) the corporate responsibility to respect human rights; and iii) access to effective remedies by victims of human rights abuses.

To operationalize this framework, Ruggie also developed – in consultation with State, business and civil society actors – the UNGPs, which provide detailed recommendations to States and companies as to how to meet their respective duties and responsibilities. Since their adoption by the HRC in 2011, they have been widely endorsed by State, business and civil society actors, and multilateral and industry initiatives have begun to converge on the standard of expected conduct they establish (e.g. the 2011 OECD Guidelines on Multinational Enterprises and the revised 2012 IFC Performance Standards). Significant progress has been made to implement the UNGPs over the past three years, including as a result of the efforts of the UN Working Group.

However, as noted above, some actors have expressed concern that progress has not been fast enough, and that the UNGPs – which are not legally binding – may not be strong enough to ensure sustained changes in business conduct. Accordingly, and as discussed above, two resolutions were passed in June 2014. One establishes the IGWG to facilitate treaty negotiations, and the other extends the mandate of the UN Working Group and highlights aspects of its program of work to implement the UNGPs.

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¹⁹ Professor John Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (Institute for Human Rights and Business, 9 September 2014), available at <http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>.